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operation was intended to be confined to a jurisdiction whose limits were fixed by the Constitution and defined by numerous decisions. Finally, it is shown, how in practice these limits have been over-stepped under a tendency to greater and greater departure from constitutional standards. This leads toward the creation of new Federal powers at the expense of the States,—powers, as the writer says, which are unlimited only because not granted,—toward the establishment of a Congressional despotism, destructive of those liberties of the citizen which have been so far the foundation stones of public contentment and prosperity.

The book is a thoughtful review of constitutional history bearing upon present problems, such as has nowhere else been given, and deserves wide attention.

THE FOUNDATIONS OF LEGAL LIABILITY. A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW.

Vol. I. Theory and Principles of Tort. BY THOMAS ATKINS STREET. Northport: Edward Thompson Co. 1906. pp. xxix, 500.

The preface to this sumptuously papered and printed volume leads the reader to expect a rare treat in the perusal of its contents. He is informed that the book "contains a new synthesis of the fundamental principles of tort along scientific and historical lines;" that the author "has turned up many new ideas, and has been able to present the old truths in new and more enlightening aspects;" that some of the author's discoveries "represent a considerable advance in legal knowledge," enabling him "to assign the conception of negligence to its proper place in legal theory." The reader is informed that "this subject of negligence has been much stirred;" and that the treatment of the subject of conversion, while apparently rather novel, proceeds "upon right lines." He is assured, also, that "no pains have been spared in writing the chapter on the law of deceit;" that "the law of deceit is not so far advanced as is the law of negligence," but "we" (the author) "have done what we could to clear the subject up." "In this," the author graciously remarks, "we have had the benefit of an important case from the House of Lords."

As one passes from this much-promising preface to the body of the text, his attention is immediately arrested by the writer's fondness for unusual terms and phrases. "Polar phenomena," "equatorial belts," "positive damnific acts," and the like are frequently repeated. An actionable assault possesses "a seditious character." Damages which are recoverable for injury to feelings are "parasitic damages." We are assured that "foresight and hindsight respectively furnish the key to the question of the extent of liability in the respective fields of contract and tort;" that "the subject of negligence is bisected by the most fundamental seam known to legal theory;" that "the law of negligence is the product of an antinomy between principles belonging to different spheres." Evidently, the author does not agree with the eminent English judge who declared that, in law, nothing is so apt to mislead as a metaphor.

The author's craze for novelty is quite as noticeable in the matter of classification as in that of diction. Negligent acts are divided into

two classes, one of which is styled "the primary trespass formation," and the other, "the secondary trespass formation." Of this classification the author modestly remarks: "The discovery and establishment of the secondary trespass formation, we make bold to believe, represent a considerable advance in legal knowledge,"—how considerable he explains, when, in another connection, he declares that this discovery has resulted in "the establishment of a new and distinctive category of tort," which "enables us to put the conception of negligence where it properly belongs." Of this achievement our author is very proud. And what author would not be proud at finding himself forced to confess that he had discovered and established a brand—"new and distinctive category of tort?" Indeed, our author is so proud that he proceeds to classify "nuisance and its cognates" as "a sort of tertiary trespass formation." His reason for this, as we understand him, is that these wrongs are "neither more nor less than an extension of the idea of trespass into the field of easements, servitudes and rights appurtenant to realty."

Whether the learned reader will lay down this book, after a careful perusal, with the learned author's admiration of it, is doubtful. One reader, at least, has been unable to discover that the secondary trespass achievement represents any advance in legal knowledge, or puts the conception of negligence where it properly belongs. He agrees with the author that the subject of negligence has been much stirred in these pages. But he has often observed that much stirring produces muddiness rather than clarification.

If the reviewer were to summarize his impressions of this volume in a single sentence it would run somewhat like this: A vaunting preface, a marvelous vocabulary, a startling classification, a strange statement, at times, of accepted doctrines, and, on the whole, a disappointment.

VOL. II. History and Theory of English Contract Law. pp. x. 559.

The point of view of this work is novel in the manufacture of law books. The treatise is very ambitious, and in several respects original. The author is to be heartily commended for resisting the temptation which encompasses the fall of so many law text book writers, of making a book "for practicing lawyers, citing upwards of ten thousand decided cases." The author of this work has assumed, very much to his credit, without deeming an explanation or an apology necessary, that there is a sufficient number of judges on the bench and attorneys practicing at the bar who have the students' recourse to the origin and historical development of principles, in the pursuit of their profession, to make a book of this sort worth while, although in the commercial sense it might not "pay." The selection by the author of the standpoint from which the book should be written evinces no mean courage, and the treatment of the subject, while not always scientifically accurate, shows not only the thorough student, but the scholar.

Part I of the volume would justify the author's use of the title "Contract," but Part II would require, in strictness, that the volume should be entitled "Contracts." An examination of the law of simple contract should not have coupled with it a discussion of the law of special con-

tracts, that is to say peculiar developments or modifications or special adaptations of the law of simple contracts, except as an incident and only for the purpose of indicating that such peculiar modifications or adaptations have taken place, and for the purpose of characterizing the peculiarities. For example, the contract of agency, the contracts known as bills and notes, the contracts known as bailments, are classes by themselves, and in dealing with the law of simple contracts should be treated, if treated at all, only in the way of an exposition of the modifications, special adaptations, or perversions wrought by special influences. The author of the work under consideration has, therefore, deviated to some extent from a scientific treatment of his subject, and has included either too much or too little in his volume. From the standpoint of a treatise on pure contract he has included far too much, because he has devoted more than half of the book to special forms of contracts. From the standpoint of a treatise on all contracts, such as the omnibus work of Parsons, he has included too little. If it is proper for him in his work to deal with bills and notes and bailments, why should he omit contracts of suretyship, insurance, bills of lading, warehouse receipts, and the like? It is difficult also to understand what place in a work, which the author calls "*Contract*," a discussion of the subject of "*representation in tort*" has or could have. Particularly is no reason for the inclusion of these topics appreciable when it is remembered that this volume is only one of several published by the same author.

The chief value of this work consists in the clear and simple exposition by the writer of the principles underlying the origin and development of the simple contract as deduced from the cases by him. There is nothing particularly novel or original in the way of conception or construction of theory, but the originality consists rather in the point of view and the faithfulness with which the author adheres to his scientific investigation and scientific treatment. The author's study of the origin and history of the unilateral contract first, and then the bilateral contract has been painstaking and thorough; and the results which he sets forth in a very commendably clear and comprehensive style are for the most part sound and faithful to the authorities. In one or two instances, it is true that the author in his eagerness to trace a scientific development finds logic in decisions where none existed. For example, he refers to the bilateral contract as the "most beautiful notion of contractual obligation ever evolved, etc." He refers to this matter in his preface on pages v and vi, in this language:— "When the bilateral contract is rightly understood, it will be found to embody the most beautiful notion of contractual obligation ever evolved by the wit of man;" and again on page 60, he says:— "The conception of a contractual obligation embodied in the bilateral contract is to our mind the most beautiful notion that ever appeared in contract law." The latter statement might go unchallenged, but the former cannot. We take it that the so-called "*evolution*" of the bilateral contract consisted either in a legal accident or an arbitrary judicial assertion. The fact, as we understand it, is that the courts, at the time referred to in the work, having held for some time that the surrender of a legal right is a good consideration for a promise, when confronted by a case wherein, instead of the surrender of a legal

right having been given for the defendant's promise, the plaintiff alleged that he had given simply a *promise* to surrender a legal right, the Court enforced the promise without so very much reasoning about it, probably on the assumption or feeling that, if the doing of a thing is sufficient consideration for a promise, then a promise to do that thing should be equally a sufficient consideration. Such a decision did of course lose sight of the origin and nature of consideration, and hence from the standpoint of logic, and viewing the law as science, the "notion" of the bilateral contract was anything but "beautiful." We think that the most that can be said of it was that it was expedient. It would not be fair to fail to point out the fact that the author recognizes the absence of real consideration in the bilateral contract. But his mistake we consider consists in treating the bilateral contract as an evolution, whereas its introduction involved rather a revolution.

We cannot consent to the author arrogating to himself the credit of "the discovery of the nature of the bilateral contract" as he does in this volume. The nature of the bilateral contract has been known for many years, and has been fully appreciated by scholars, both students and teachers. The author should be accorded the credit of clearly stating the nature of that kind of contract, and such credit is cheerfully given him. The work in this regard is well done. It adds to the available material on the subject, but the work in this regard is not pioneer work, nor does it involve anything new or particularly novel.

The author speaks of the covenant as having at one period been other than a formal contract. It is doubtful if there is any evidence to show that it was ever anything else.

We take emphatic objection to the suggestions made on page 56 by the author that the unilateral contract may be treated as a formal or quasi-formal contract, and coupled with that his assertion that consideration may be treated as a matter of form as well as of substance. It never was so treated, and never properly could be so treated. We had come to believe that this error had been eradicated from books dealing with contract law, and are much disappointed to find it perpetuated in this work. The simple contract came into our law through tort. The first writs issued to enforce contract obligation were properly writs on the cases in the nature of deceit, the theory being that the plaintiff had been induced by the promise of the defendant to give up something which he was not legally obliged to give up. If the plaintiff had not given up anything, he was not deceived to his injury by the promise, and hence was given no right of action. If that is, briefly stated, the origin of simple contract in our law, then it is obvious that the surrender of the legal right by the promisee never was a matter of form but was from the beginning a matter of real substance. Suggestions that consideration is only required to demonstrate deliberation upon the promise, and, that the promise was not given lightly or thoughtlessly, and similar suggestions, like that in this work, that the consideration may be deemed a matter of form, should once for all be relegated to the ash heap of exploded and discarded legal notions, where they belong.

But the book, particularly the part dealing with the simple contract, is on the whole praiseworthy, and is entitled to appreciation. It will

repay a careful reading, and would be valuable as the possession of any student.

The author was properly ambitious in his work, and boldly makes claims for what he has done, and some of his claims are amply justified.

THE LAW OF TRADEMARKS AND UNFAIR TRADE. BY NORMAN F. HESSELTINE. Boston: Little, Brown & Co. 1906. pp. xlviii, 390.

"Nor is it necessary in order to get a right to an injunction that a specific trademark should be infringed; but it is sufficient that the Court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant; and that he persists in so doing after being requested to desist." *McClain v. Fleming* (1877) 96 U. S. 245. See also *Avery v. Michele* (1882) 81 Ky. 73.

It has taken many years and many decisions for the courts to arrive at the point of view expressed in the quotation from *McClain v. Fleming*, and to readopt the theory which seems first to have actuated courts in taking jurisdiction. In the books there are early cases to the effect that an action on the case for *deceit* will lie against a clothier "who sells bad cloth upon which he put the mark of another." See *Southern v. How* (1590) 2 Popham 144, which Browne in his work on trademarks regards as an authority that manufacturers may bring the action.

Hopkins and Browne have given the genesis of the law showing the return of courts to the ground of fraud as a reason for granting relief in cases of unfair trade, and the consequent distinction between the two closely related topics. But it has remained for Mr. Hesseltnine to collect and reduce to a digest "all cases on this subject in the United States Courts, the decisions on trademarks of the Commissioner of Patents and the important State and English decisions."

The distinction between unfair trade and the infringement of trademark is one which not only has caused the practitioner no little anxiety, but has led the courts into conflicting decisions and theories; indeed it was not until the cases cited *supra* that the doctrine of unfair trade was given a sound basis in this country. Mr. Hesseltnine has succeeded admirably in marking this distinction or rather in showing that the law of Trademark has, in reality, a narrower scope than that of Unfair Trade.

Though possibly one is at first inclined to take issue with Mr. Hesseltnine upon his statement that "the legal profession now wants the law and cases, not pages of theoretical reasoning," yet an increasing familiarity with the cases leads one to the irresistible conclusion that a book based upon any other theory would, so far as the subject in hand is concerned, be of little value for practical purposes inasmuch as in this branch of the law more, perhaps, than in any other, each case seems dependent upon its own facts. The author seems to have arranged his book with some reference to logical order; in grouping his cases under appropriate headings and in obtaining an arrangement of topics which to an ordinary mortal is reasonable, he has succeeded better than many digest writers with whose work we are acquainted, in producing a book of real utility. Indeed in the present work a case is found where one would reasonably expect it to be.